

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 10, 2011

In the Matter of M. J. BEENE, Minor.

No. 297884
Kent Circuit Court
Family Division
LC No. 09-054249-NA

Before: OWENS, P.J., and MARKEY and METER, JJ..

PER CURIAM.

Respondent-appellant father appeals as of right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) and (h). We affirm.

The trial court did not clearly err in finding that the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). This proceeding to terminate respondent's parental rights was initiated by the minor child's guardian. The minor child resided with petitioner most of the time from six months to seven years of age. Both respondent and M.J.'s mother, January Estrada, were incarcerated on convictions of maintaining a drug house when M.J. was born, but were later released. Respondent had contact with M.J. and resided for short periods of time with M.J. and Estrada when M.J. was between 17 months and 5 years of age. Respondent objected to providing petitioner authorization to obtain medical and dental treatment for M.J., so petitioner sought, and on March 28, 2007 obtained, full legal guardianship of M.J. Respondent and Estrada objected to the guardianship, and in August 2007 the trial court established a court-structured plan (the plan) to facilitate M.J.'s return to them. In March 2008, respondent was arrested for conspiring to utter and publish, and became re-incarcerated in September 2008 for 4 to 30 years. Likewise, Estrada became re-incarcerated for 5 to 30 years for uttering and publishing, and later perjury. On November 18, 2009, petitioner initiated this proceeding to terminate both respondent's and Estrada's parental rights.

Respondent first argues on appeal his case is analogous to *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), in that the trial court erred in terminating his parental rights merely because he was incarcerated because the evidence did not establish §§ 19b(3)(g) or (h). Respondent argues he provided proper care or custody for M.J. during the four years he was free from prison and that M.J. would not be deprived of a normal home while he was incarcerated because M.J. remained in petitioner's home, which was his normal home.

The evidence showed respondent failed to provide any care, custody or support for M.J. for the first 17 months of his life due to incarceration. During the four years respondent was out of prison he enjoyed time with M.J. in the company of the extended paternal family, on holidays and birthdays, on some outings and weekends, and during short periods of time he resided with Estrada. In total, some evidence showed M.J. may have resided with respondent perhaps four months of 2006 in a home that required extensive remodeling and later burned, on one occasion when respondent removed him from petitioner's home with the help of police, and at most six to nine months in 2007 in a home with Estrada during which time M.J. was under the guardianship of petitioner and often returned to petitioner's home. Estrada's testimony that it was "easier" for M.J. to stay with petitioner appeared indicative of respondent's and Estrada's attitudes toward providing M.J. with proper care or custody. As the trial court correctly noted, it was petitioner who consistently provided the place M.J. called home.

Clear evidence also showed that respondent failed to provide M.J. with adequate financial support although he was able to do so. Respondent testified he paid petitioner approximately \$500 for M.J.'s care during the four years he was out of prison, a small amount in light of his own testimony that he earned \$75,000 to \$80,000 a year in concrete construction and had other assets and money set aside in a trust fund. Evidence was presented that respondent also failed to adequately support his other minor children. Respondent's argument on appeal that petitioner's motivation for seeking termination of his parental rights was her desire to collect additional social security benefits by adopting M.J. advances no purpose other than to disparage petitioner who took consistent care of M.J. for 6-1/2 years without sufficient recompense, while he concealed money for his future use instead of supporting his children.

With regard to whether respondent could become able to provide M.J. proper care or custody within a reasonable time, a respondent's past failure to provide proper care for a child because of incarceration is not always decisive on the question of his ability to provide future care, *Mason*, 486 Mich at 161. However, in the present case respondent also failed during the four years he was out of prison to provide M.J. with proper care, custody or financial support, or comply with the very minimal requirement of attending parenting classes under the plan in an effort to gain his custody. We further note that he did not provide for M.J.'s alternate custody with petitioner. Rather, he refused to grant her authority to access medical care for M.J., removed M.J. from her home, and opposed the guardianship that would provide stability for M.J. Given his past failures and re-incarceration for 2-1/2 years hence, the trial court did not err in terminating respondent's parental rights pursuant to § 19b(3)(g).

With regard to the additional requirement under § 19b(3)(h) that M.J. would be deprived of a normal home for more than two years, the evidence clearly showed respondent's earliest release date was September 21, 2012. The two-year period of incarceration referenced in § 19b(3)(h) begins at the time of the termination hearing, and includes both the time respondent is incarcerated and the time required for respondent to provide a normal home for the children. *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). Respondent's earliest release date was slightly less than 2-1/2 years after the April 9, 2010 termination hearing. The two-year period required under § 19b(3)(h) was met.

Respondent asserts on appeal that M.J. would not be deprived of a normal home for more than two years while he is incarcerated because M.J. remained in his normal home with petitioner. Respondent suggests continuation of M.J.'s guardianship until he is released from prison instead of termination of his parental rights. However, under the particular facts of this case, we believe that remaining with petitioner under a guardianship did not constitute a normal home. The evidence showed respondent continually subjected M.J. to custodial instability while he was free from prison, as evidenced by respondent's opposition to petitioner's guardianship, removal of M.J. from her home, and his effort to set aside the guardianship. A guardianship subject to constant challenge does not provide the permanence and stability of a normal home.

Respondent's case is not analogous to *Mason*, 486 Mich 142. A distinction must be made between terminating parental rights merely *because* a respondent is incarcerated, and terminating parental rights of an incarcerated respondent. In *Mason*, 486 Mich at 146, the Supreme Court expressed as grounds for reversing the order terminating that incarcerated father's parental rights petitioner's failure to facilitate his participation in several review hearings by telephone as required by MCR 2.004, thus depriving him of an opportunity to participate in the proceeding; petitioner's failure to involve him in the reunification process and provide services necessary to reunify him with his children; and the trial court's failure to consider the children's placement with paternal relatives or properly evaluate whether placement with respondent could be appropriate for the children in the future. The Supreme Court stated, "[i]ncarceration alone is not a sufficient reason for termination of parental rights." *Mason*, 486 Mich at 146.

The present case is not analogous to *Mason* because respondent was provided an opportunity to be heard and call witnesses on his behalf, and had the opportunity to demonstrate his ability to care for M.J. and to comply with the plan under M.J.'s guardianship by simply completing parenting classes, and because the trial court considered, and indeed the entire proceeding centered around, M.J.'s placement with a relative, petitioner, as an alternative to termination of respondent's parental rights. The trial court terminated respondent's parental rights not because he was incarcerated, but because clear and convincing evidence proved he had failed for M.J.'s entire lifetime to provide him with the proper care, custody or financial support expected and required of a parent. Continued inability for an additional 2-1/2 years due to his re-incarceration was added evidence, but not the basis for the trial court's decision.

Further, the evidence showed that termination of respondent's parental rights was in M.J.'s best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Respondent argues reunification efforts upon his release from prison would be in M.J.'s best interests instead of terminating his parental rights because they enjoyed a bond and a good relationship, respondent's health and income potential were better than petitioner's, and respondent could provide a male role model for M.J. Although respondent and M.J. enjoyed a relationship, the evidence showed their bond was not a parent-child one upon which M.J. could depend. Respondent did not direct his good health and income potential toward M.J.'s benefit while he was out of prison, but instead petitioner was M.J.'s consistent provider and caregiver, and although respondent could serve as a male role model for M.J. where petitioner could not, the evidence supported the trial court's observation that respondent's continual criminality and failure to use his concealed assets to support his children generally rendered him a poor role model. The trial court did not err in finding termination of respondent's parental rights and

affording M.J. the permanency of adoption into the home he had known for most of his life to be in M.J.'s best interests.

We also conclude on appeal that the trial court did not err in finding reasonable efforts were made to prevent M.J.'s removal and facilitate reunification. Whether reasonable efforts were made is a question of fact. This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Miller*, 433 Mich at 337. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* At birth M.J. had no home from which to be removed or to which to return because both respondent and Estrada were incarcerated. Therefore, no services could rectify the condition of incarceration. Respondent was later released and the condition of adjudication upon which the trial court assumed jurisdiction over M.J. in this proceeding was MCL 712A.2(b)(4), failure to comply with a court-structured plan. Respondent's testimony clearly showed he did not complete parenting classes or otherwise join in the plan. Respondent's failure to properly support and care for M.J. while not in prison, a complete lack of evidence he requested reunification services, and his refusal to participate in a plan demonstrating his ability to parent when provided the opportunity to regain M.J.'s custody, renders without merit his argument that reasonable reunification efforts were not made.

Respondent next asserts his counsel's concession of the statutory grounds for termination, in particular his failure to vigorously argue M.J. would not be deprived of a normal home life for more than two years during respondent's incarceration because he resided in a normal home with petitioner, prejudiced the outcome of the termination hearing, thereby depriving him of the right to effective assistance of counsel. To establish a claim of ineffective assistance of counsel, respondent is required to show that his attorney's performance was prejudicially deficient, and that under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039, 2046; 80 L Ed 2d 657 (1984). To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel's conduct did not fall below an objective standard of reasonableness where he relied on a best interests argument instead of contesting the statutory grounds for termination in light of evidence respondent failed to support or provide proper care for M.J. for the years he was out of prison and where he would remain incarcerated a minimum of 2-1/2 additional years. We further find that counsel's decision not to assert that M.J. remained in a normal home while respondent was incarcerated did not fall below an objective standard of reasonableness and did not prejudicially affect the outcome of the proceeding because, as noted above, M.J.'s residence with petitioner under a guardianship subject to continual challenge did not constitute a normal home.

Lastly, respondent argues the trial court's statement, "If there's one thing that's out there, there are too many black fathers that are males in prison where their kids are left with others," constituted structural error and requires automatic reversal of the order terminating his parental rights. Structural errors are errors in the framework, not the process, of the trial proceeding that defy harmful error analysis because they are intrinsically harmful without regard to their effect on the outcome, and require automatic reversal. *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000), citing *Neder v United States*, 527 US 1, 7-8; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. *Id.* Error has been found to be structural error in a very limited class of cases, one of which is the presence of a biased trial judge. *Duncan*, 462 Mich at 52, citing *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 2d 749 (1927).

A review of the record shows the trial court's comment was the only comment he made regarding black males, and it was made only in response to respondent's direct claim that M.J. needed a "black" male role model. It was not a showing of racial bias, and it related directly to the facts in this case because respondent was a black male in prison, claiming to be a role model. Respondent concedes it was more probable than not that the trial court judge harbored no racial bias or discrimination toward him, and given no evidence on the record as a whole of the trial court's racial bias, its isolated comment regarding black males in prison did not so impact the framework of the proceeding as to constitute structural error.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter